United States
Circuit Court of Appeals
For the Ninth Circuit.

J. V. Spaugh and Harry M. Curry,
Appellants,

vs.

United States of America,
Appellee.

BRIEF ON BEHALF OF APPELLANT J. V. SPAUGH.

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
Title Ins. Bldg., 433 S. Spring St., Los Angeles,
Attorneys for Appellant J. V. Spaugh.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States District Court, in and for the Southern District of California, Central Division, Hon. Harry A. Hollzer, Judge, after a verdict by a jury finding appellant and others, including Harry M. Curry, guilty of conspiracy to forge Government Bonds. Appellant and said Harry M. Curry alone appeal on a joint record with separate briefs. By the terms of the judgment appellant J. V. Spaugh was sentenced to imprisonment in the McNeill Island Penitentiary for a period of eighteen months and to pay a fine

in the sum of One Thousand Dollars ($1000.00), and to stand committed in default of the payment of said fine.

The indictment containing the charge upon which Appellant Spaugh was found guilty was the so-called conspiracy indictment, No. 11752-H. Over the objection and exception of Appellant Spaugh this indictment was consolidated for trial with six other indictments, in none of which was Appellant Spaugh named as a party defendant.

THE QUESTIONS INVOLVED.

The questions involved in this appeal are as follows:

1. May an indictment against a defendant and others be properly consolidated for trial, over the objection and exception of such defendant, with six other indictments in which such defendant is not named as a party?

2. May the court on its own motion recall the jury after it has commenced its deliberations and before the completion of the same, and inquire of the jury over defendant's objection and exception and receive an answer as to how the jury stands numerically on the balloting?

3. Does the action of the trial court in recalling the jury and giving a supplemental instruction to the effect that it is the duty of the jury to decide the case if they can conscientiously do so and that the minority should ask themselves whether they may not reasonably doubt the correctness of a judgment which is not concurred in by the majority, constitute coercion?

STATUTES INVOLVED.

The only statute involved in the consideration of this appeal is the statute relative to consolidation of indictments, which reads as follows:

> "Sec. 557. *Same; joinder of charges.* When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated. [R. S. Sec. 1024.]"
>
> 18 U. S. C. A. 557.

STATEMENT OF FACTS.

Appellant J. V. Spaugh together with Appellant Harry M. Curry and eleven others were indicted on a charge of conspiracy to make, forge and counterfeit certain orders and writings, to-wit, United States Liberty Loan Bonds [Tr. pp. 5-10], said indictment being No. 11752-H and which for convenience will be hereinafter referred to as the conspiracy indictment. Six other indictments were returned against various groups of defendants named in the conspiracy indictment, in none of which said other indictments, however, was Appellant J. V. Spaugh named as a defendant. Said other indictments were numbered 11668-H, 11751-H, 11755-H, 11756-H, 11757-H, 11758-H. Said other indictments contained various counts charging various groups of defendants therein named with the substantive offenses of forging liberty bonds and uttering the same. Said other indictments are set forth in full

in the bill of exceptions [Tr. pp. 23-62]. The said conspiracy indictment, 11752-H, was consolidated for trial with said six other indictments over the objection and exception of Appellant J. V. Spaugh [Tr. p. 15] [Tr. pp. 22, 23]. The trial consumed approximately three weeks [Tr. p. 115]. The evidence introduced under the conspiracy indictment No. 11752-H as regards the Appellant J. V. Spaugh was conflicting and controverted by facts and evidence introduced by Appellant J. V. Spaugh [Tr. pp. 62, 63]. Appellant Spaugh has deemed it unnecessary to burden this court with a statement of all the evidence introduced at the trial, for the reason that the errors herein urged may be considered without the necessity and labor of reviewing the evidence. By stipulation of the parties [Tr. p. 131] and order of court [Tr. p. 133] a statement of the evidence has been omitted from the bill of exceptions.

It was stipulated that the evidence as regards the guilt of Appellant J. V. Spaugh was conflicting but sufficient to sustain the verdict [Tr. p. 131]. No point is made herein as to the sufficiency of the evidence to warrant or sustain the verdict other than to call this Honorable Court's attention to the fact that the evidence relative to the guilt of Appellant Spaugh was conflicting and controverted.

Appellant Spaugh objected to the introduction of any evidence offered by the Government in support of the indictments other than the conspiracy indictment, No. 11752-H, on the grounds that the same was hearsay, incompetent, irrelevant and immaterial and not within the issues insofar as this appellant was concerned. This objection was overruled, to which ruling appellant excepted [Tr. p. 63]. At the conclusion of the trial the court in-

structed the jury for a period in excess of two hours, commenting in detail on many questions of fact which were involved only in the indictments other than the conspiracy indictment [Tr. p. 115]. The instructions cover pages 64 to 113 inclusive of the transcript herein. During the course of the instructions and in commenting upon the facts, the court told the jury that the evidence was clear that certain endorsements were forged. [Tr. p. 104], [Tr. p. 106], [Tr. p. 109].

The jury retired to deliberate upon their verdict on Saturday, January 27, 1934, at the hour of 1:43 p. m. [Tr. p. 113].

On Monday, January 29, 1934, at 12:15 p. m., after the jury had been deliberating approximately forty-six hours, the court on its own motion recalled the jury [Tr. p. 113] and after inquiring and ascertaining that the jury had not concluded balloting on all counts of all indictments [Tr. pp. 114, 115], gave a supplemental charge to the effect that it was the duty of the jurors to decide the case if they could conscientiously do so and that the minority ought to ask themselves whether they should not doubt the correctness of a judgment which is not concurred in by the majority [Tr. pp. 116, 117]. An objection and exception was duly noted by Appellant J. V. Spaugh to the giving of this supplemental charge [Tr. p. 118].

The court thereupon made inquiry of the jury as to which cases balloting was still in progress. The foreman replied in substance as follows: that balloting was not completed in case No. 11752-H, in which the defendants on trial were Clough, Malowitz, Appellant J. V. Spaugh and Appellant Harry M. Curry; that balloting was not completed in case No. 11755-H, in which the only de-

fendants on trial were Clough and Appellant Harry M. Curry; that balloting was completed in case No. 11668-H, in which the defendant Clough was the only defendant on trial; that balloting was also completed in case No. 11751-H, in which the only defendants on trial were Clough and Malowitz [Tr. p. 114]; that balloting was also completed in case No. 11756-H, in which the defendant Clough was the only defendant on trial [Tr. p. 115].

The court thereupon and while the jury were still deliberating as to the guilt or innocence of Appellant J. V. Spaugh and also Appellant Harry M. Curry and before the jury had reached a verdict as to Appellant J. V. Spaugh and Appellant Harry M. Curry, made inquiry of the jury as to how the jury were divided numerically in the balloting in the conspiracy case, No. 11752-H. Appellant J. V. Spaugh and Appellant Harry M. Curry and each of them objected to said inquiry; said objection was overruled, to which ruling each of said appellants noted an exception [Tr. pp. 119, 120]. In response to said inquiry by the court, the foreman replied that as to one defendant the ballot was ten to two and as to the other defendant the ballot was eleven to one.

Over the objection and exception of Appellant J. V. Spaugh and Appellant Harry M. Curry, the court then inquired as to the numerical division of the balloting in case No. 11757-H, in response to which said inquiry the foreman replied that the division was eleven to one. (The Appellant Harry M. Curry was a defendant in said case No. 11757-H.) [Tr. p. 121.]

Thereafter the court answered a question submitted by the foreman of the jury and later amplified such answer

and reread a portion of the instructions theretofore given [Tr. pp. 122-126]. The jury then retired.

The following day, Tuesday, January 30, 1934, at about the hour of 11:55 A. M., the jury returned a verdict in the conspiracy case No. 11752-H. The said verdict was separate as to each defendant on trial and bore a separate date as to each defendant on trial. The jury found the defendants Clough and Malowitz guilty, the verdicts being dated (Saturday) January 27, 1934. The jury likewise found the Appellant Harry M. Curry guilty, the verdict being dated (Monday) January 29, 1934. The Appellant J. V. Spaugh was likewise found guilty, the verdict being dated (Tuesday) January 30, 1934. [Tr. pp. 126, 127.]

In case No. 11757-H the defendants Clough and Malowitz and Appellant Harry M. Curry were found guilty, the verdict being dated (Saturday) January 27, 1934, as to defendant Clough; (Sunday) January 28, 1934, as to the defendant Malowitz; and (Monday) January 29, 1934, as to the Appellant Harry M. Curry [Tr. pp. 127, 128.]

Thereafter the Appellant J. V. Spaugh moved the court to vacate and set aside the verdict of guilty theretofore rendered and moved the court for a new trial on the following grounds, among others:

1. That the court erred in consolidating the indictment in the conspiracy case, No. 11752-H, for trial over the objection and exception of Appellant J. V. Spaugh, with six other indictments in which the Appellant J. V. Spaugh was not named as a party.

2. That the court erred in inquiring of the jury while they were still deliberating upon the case of Appellant J. V. Spaugh as to how they were divided numerically.

3. That the court erred in instructing the jury to the effect that the minority of the jurors should yield their dissenting opinions to the majority and that such instruction constituted an act of coercion by the court.

Said motion for new trial was denied on the 12th day of March, 1934 [Tr. pp. 129, 130]. On the 15th day of March, 1934, Appellant J. V. Spaugh was sentenced to imprisonment for a period of eighteen months in the United States Penitentiary at McNeill Island, Washington, and to pay a fine in the sum of One Thousand Dollars ($1000.00), and to stand committed in default of the payment of the fine [Tr. p. 19].

Specification of Errors Relied Upon.

The Appellant J. V. Spaugh submits the following specification of errors relied upon on this appeal:

I.

That the Court erred in consolidating the indictment in the case of United States of America, Plaintiff, vs. Roscoe Clough, J. V. Spaugh, et al., Defendants, being No. 11752-H, for trial, over the objection of the defendant J. V. Spaugh, with indictments in the following cases in which the defendant J. V. Spaugh was not named as a defendant:

United States of America v. Roscoe Clough, No. 11668-H;

United States of American v. Roscoe Clough and Jack Malowitz, No. 11751-H;

United States of America v. Roscoe Clough and Harry M. Curry, No. 11755-H;

United States of America v. Roscoe Clough, No. 11756-H;

United States of America v. Roscoe Clough, Jack Malowitz and Harry M. Curry, No. 11757-H;

United States of America v. Roscoe Clough, No. 11758-H.

[Assignment of Error No. I, Tr. pp. 142, 143.]

II.

The Court erred in recalling the jury after it had retired and had been deliberating for forty-six hours and, over defendant's objection, inquiring of the jury as to how it was divided numerically while the jury was still deliberating upon its verdict as to the defendant J. V. Spaugh and had not reached an agreement as to the defendant J. V. Spaugh, said inquiry being as follows:

"Without indicating just how many ballots have been for one way and how many ballots the opposite way, that is to say, without indicating just how many stand in any particular way, either for acquittal or otherwise, but merely giving the numbers voting one way as against the other way; for example, if in one case stands 6 to 6, without indicating anything further, or if another case the vote stands 8 to 4, without indicating how many stand for acquittal and how many for conviction, may we ask you to indicate first of all, how many ballots have been taken in 11,752, which is the so-called *conspiracy charge.*

Foreman Person: Your Honor, the different number of ballots have been taken separately against the different defendants.

The Court: Well, then, coming now to the last balloting, will you indicate the numerical division,

without indicating how many voted for acquittal and how many voted otherwise." [Rep. Tr. p. 1719, line 21 to p. 1720, line 13.]

"The Court: Now, turning to case No. 11,752, may we inquire as to any balloting that still remains to be done, without indicating as to which defendant, but as to any balloting that still remains to be done—the numerical division with respect to such ballot.

Foreman Person: In the case of one defendant, the ballot is ten to two; in the case of another defendant it is eleven to one." [Rep. Tr. p. 1721, lines 10-17.]

[Assignment of Error No. VIII, Tr. pp. 146, 147.]

III.

The Court erred in making the following inquiry of the jury while the jury was still deliberating upon the case of the defendant J. V. Spaugh:

"The Court: Well, then coming now to the last balloting, will you indicate the numerical division, without indicating how many voted for acquittal and how many voted otherwise." [Assignment of Error No. IX, Tr. p. 147.]

IV.

The Court erred in instructing the jury and in giving a supplemental charge to the jury on Monday, January 29, 1934, as follows:

"The only mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking in all cases, absolute certainty cannot be attained or expected.

Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the United States to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in reasonable doubt, the defendant is entitled to the benefit of such doubt. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and possibly distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. And, on the other hand, if much the larger number of your panel are for the con-

> viction, a dissenting juror should likewise consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath."

which said instruction and supplemental charge constituted an act of coercion on the part of the trial court and coerced the minority of the jury to surrender their honest convictions in order to join the majority in bringing in a verdict of guilty, against the dictates of their own judgment. [Assignment of Error No. VII, Tr. pp. 144-146.]

V.

The Court erred in giving the jury the following instruction:

> "The instruction did go on to point out that, keeping in mind that rule, if on the one hand a majority are for acquittal, the minority ought to seriously ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated. And we further pointed out that if, on the other hand, much the larger number of the panel are for a conviction, a dissenting juror should likewise consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath." [Assignment of Error No. X, Tr. pp. 147, 148.]

ARGUMENT.

I.

The Consolidation of the Conspiracy Indictment No. 11752-H, Over the Objection and Exception of Appellant, for Trial With Six Other Indictments in Which the Appellant Was Not Named as a Defendant, Was Reversible Error. (Specification of Error No. I.)

The statute relating to the consolidation of indictments is found in Title 18, Sec. 557, United States Code Ann., and reads as follows:

> "Sec. 557. *Same; joinder of charges.* When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated. [R. S. Sec. 1024.]"

This statute does not authorize the consolidation of indictments where the defendants are not the same in each indictment. In the instant case appellant was a defendant in the conspiracy case only and was not named as a defendant in any of the six indictments with which the conspiracy case was ordered consolidated. The various counts of the six indictments other than the conspiracy indictment are based upon separate and distinct acts and transactions charging specific acts of forgery and the uttering of forged paper by various groups of defendants

other than the appellant. Certain of the defendants were named in all of the indictments and certain of the defendants were named in some of the indictments, the various groups being separate and distinct. The indictments are set forth in full in the Transcript, pages 23 to 62.

The leading case on the question of consolidation of indictments is *McElroy v. United States,* 164 U. S. 76, 41 L. Ed. 355, wherein the Supreme Court held that it was reversible error to order the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. The Supreme Court states at page 357 of 41 L. Ed.:

> *"The several charges in the four indictments were not against the same persons,* nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or restrict the evidence to one transaction. Young v. King, 3 T. R. 98, 106; Reg. v. Heywood, Leigh &

C. C. C. 451; Tidal, C. J., O'Connell v. Reg. 11 Clark & F. 241; Reg. v. Ward, 10 Cox, C. C. 42; Rex v. Young, Russ. & R. C. C. 280, note; Reg. v. Lonsdale, 4 Fost. & F. 56; Goodhue v. People, 94 Ill. 37; State v. Nelson, 8 N. H. 165; People v. Aikin, 66 Mich. 470; Williams v. State, 77 Ala. 53; State v. Hutchings, 24 S. C. 142; State v. McNeill, 93 N. C. 552; State v. Daubert, 42 Mo. 242; 1 Biship, Crim. Proc. Sec. 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error.

"It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defedants charged with a crime different from that for which all are tried. * * *

"While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, *such joinder cannot be sustained where the parties are not the same* and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such cases that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion." (Italics ours.)

In the case of *DeLuca v. United States,* 299 Fed. 741, C. C. A., Second Circuit, May 15, 1924, the consolidation of an indictment charging conspiracy to defraud the United States by removing certain opium from a bonded warehouse upon which import duty had not been paid, with an indictment charging a substantive offense involving the narcotic laws, was held to be error. The court, following the *McElroy* case, *supra,* announced the rule that there could be no consolidation unless all the defendants are identical in all the indictments. The language of the court in this respect is found on page 744 as follows:

> "In the instant case the conspiracy indictment was against the plaintiffs in error and seven others. The indictment founded on the Harrison Act was against the plaintiffs in error and three others. Each indictment was against a definite group. Although it appears that certain of the defendants were members of both groups, others were not, and therefore the groups were distinct. The statute refers to several charges, which shall be against the same persons, and when the charges are against more than one person, *there can be no consolidation by the court, unless all the defendants are identical in all the indictments.* In the McElroy case, *supra,* a similar question was presented, and it was held that where several charges were made in four indictments, not against the same persons, and which were consolidated, the conviction after such consolidation could not be sustained." (Italics ours.)

And again at page 746:

> "While both groups of the defendants might be said to have a similar general purpose in view of trafficking unlawfully in narcotics, this does not justify the consolidation of the charges into one bill

and a trial thereof at one time. The only exercise of discretion in permitting consolidation of indictments relates to those which could lawfully have been joined in separate counts in one indictment by the grand jury. The court's discretion is to determine whether the interest of justice will be furthered by consolidating such indictments; but where the accusations could not have been charged in one indictment by the grand jury, they cannot be consolidated by the court.

"There are other errors assigned and argued, which we need not consider, because we deem the one referred to as fatal, and requiring reversal of the judgment of conviction.

"Judgments reversed."

In *Zedd v. United States,* 11 Fed. (2d) 96, C. C. A. 4th Circuit, January 13, 1926, the judgment was reversed solely upon the grounds of improper consolidation, the court deeming it unnecessary to consider other assignments of error. In that case three informations, each naming one defendant and each containing several counts charging violations of the National Prohibition Act, were, over the objection and exception of defendants, ordered consolidated for trial and submitted to the same jury. The Circuit Court, on the authority of *McElroy v. United States,* held such consolidation to be reversible error, stating that the *McElroy* case condemned forcing a common trial of separately charged defendants. The court also referred to the early case of *United States v. Durkee,* Federal Cases No. 15008, Northern District of California, 1856, wherein it was held that the consolidation of separate indictments against different defendants was unauthorized. The court in the *Zedd* case swept aside the assertion of counsel for the Government that the procedure

adopted in that case by the trial court permitted business to be dispatched and that it would be a distinct setback to the effort being made to bring about swift justice and avoid delay in criminal matters for the court to follow the rule in the *McElroy* case. In disposing of this contention the court states at page 98:

> "On the other hand, the fair, swift, sure, and cheap administration of criminal justice, in our view, will as a rule, be promoted and not hindered by adhering in this matter to what has been the immemorial practice sanctioned as that has been by what was said or decided in Durkee's, McElroy's and Goldberg's cases, *supra,* that is by refusing to compel separately indicted individuals, against their objection, to go to a common trial.
>
> "It follows that the judgments below must be reversed, and the cases remanded in order that each of the defendants may be given a new trial.
>
> "Reversed."

To the same effect is *Gallaghan v. United States,* 299 Fed. 172, C. C. A. 8th Circuit, April 28, 1924, wherein it was held to be error to consolidate three informations charging violations of the National Prohibition Act against different defendants, the court stating the rule at page 174 as follows:

> "The information in No. 2227 charged Jackson and the two Colwells, in No. 2238 it charged Gallaghan and the two Colwells, and in No. 2248 it charged Shea and Stevens and the two Colwells. The six offenses as charged in the three informations could not have been joined in separate counts in one information. Therefore, there could be no consolidation under section 1024, R. S. (section 1690, Comp.

St.). McElroy v. U. S., 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355. There were parties defendant in each information, put upon trial, who were not defendants in either of the other two informations."

In *Hersh v. United States,* 68 Fed. (2d) 799, this honorable court, speaking through Senior Circuit Judge Wilbur, recognized the long established and well settled rule that indictments may not be consolidated for trial where the defendants are not identical. The holding of the court in this connection is found at page 807 as follows:

> "While it was error to consolidate the two indictments for trial in view of the fact that Auerbach was a defendant in one indictment and not in the other, in view of his acquittal the two indictments now may be properly consolidated if a new trial is had."

The appellant Spaugh made seasonable and timely objections to the order of consolidation made in the instant case and duly excepted the court's ruling thereon. [Tr. pp. 22, 23.] [Tr. p. 15.] That appellant was prejudiced by the order of consolidation cannot be doubted. It "tended to confound" *(McElroy* case, *supra,)* him in his defense and prejudiced him as to his challenges and distracted the attention of the jury. The trial lasted approximately three weeks. Much of the evidence was directed to establishing substantive offenses of forgery and uttering forged paper against other defendants. This statement is verified by an examination of the court's instructions, commencing on page 89 of the Transcript and

continuing to page 113. During this portion of the instructions the court made detailed statements as to the nature of the various charges of forgery and of uttering forged paper contained in the indictments for the substantive offenses. The court likewise commented at length upon the facts. [Tr. pp. 100-112.] During this comment the court stated that certain bonds were forged and that while certain checks had been satisfactorily explained, others had not, some instances being as follows:

> "There are other checks, however, which have not been explained, as we appraise the evidence, as being issued in discharge of any obligations of the Refiners Corporation. [Tr. p. 102.] . . .
>
> "And then you will recall the evidence to the effect that all of the Wideman bonds were stolen at one and the same time.
>
> "These are circumstances which are entitled to consideration in conjunction, of course, with all the evidence as to whether or not there is a connection criminal in its nature and tending to establish the charges not only in indictment No. 11,755, *but also in the alleged conspiracy charge.*
>
> "We believe that the evidence shows, without contradiction that *such bonds as were passed* in connection with the transaction as described here during the trial, to the extent that they bore any endorsement, contained forged endorsements. In other words, somebody forged the names of the true owners of these bonds.

"Our appraisal of the evidence is that no inference would be warranted to the effect that any one of these endorsements were genuine. . . . [Tr. pp. 102, 103.]

"*Now, the evidence shows very clearly that that endorsement was a forgery.* . . .

"Then, too, you will remember the evidence to the effect that all of these W. N. Hawley, those involved in this indictment, No. 11,756, those involved in indictment No. 11,758, *were stolen* at one and the same time. [Tr. p. 104.] . . .

"I believe Mr. Curry denies having any knowledge of that transaction. Mr. Malowitz states he didn't know of it until after the bonds had been delivered to Ehrlich; that he only learned of it after he saw them in Ehrlich's hands.

"These bonds purport to bear the endorsement of the payee, but *the evidence shows very clearly that the endorsements were forged.* [Tr. p. 106.] . . .

"We think the evidence very clearly shows that the person who then appeared at the bank was not Mary E. Martin, the payee of these bonds, and *the endorsements then made at the bank were forgeries.*

"Fogg and Hogan on the dates of these endorsements all tell us that these bonds were cashed at the Farmers & Merchants National Bank, some time on Saturday, July 22nd.

"It is the belief of Mr. Fogg, if not others, that the endorsements were forged shortly before 12:00 o'clock noon. [Tr. p. 109.] . . .

"Mrs. Senhouse admits that she forged the name of Cordelia Nelson and the endorsing of these two bonds at the bank. She and Sonnenberg admit that they passed or uttered or published these bonds in connection with the transaction whereby $1,600 were borrowed from the bank." [Tr. p. 111.] (Italics ours.)

The foregoing excerpts, together with other statements of fact made by the court in its instructions, were based upon a mass of evidence which distracted the attention of the jury from appellant's defense. The charge upon which appellant was tried was entirely separate and distinct from the charges laid in the six other indictments. The appellant was charged in only one count with conspiracy, whereas the other six indictments contained a total of twenty-seven counts against various defendants. It was psychologically impossible for the jury to follow the evidence applicable to the appellant's case and distinguish it from the evidence applicable to the twenty-seven counts of the other six indictments. The effect of the consolidation was to overwhelm appellant with this great volume of evidence and place him at a serious disadvantage in making his defense, to his great prejudice. The order of consolidation was therefore not only erroneous but also highly prejudicial, and for this error, under the foregoing authorities, the judgment should be reversed.

II.

The Court Committed Reversible Error in Recalling the Jury While It Was Still Deliberating as to the Guilt or Innocence of Appellant and Inquiring, Over Appellant's Objection and Exception, and Receiving an Answer as to How the Jury Were Divided Numerically on the Balloting. (Specification of Error No. II.) (Specification of Error No. III.)

The rule is now settled that it is reversible error for the trial court to inquire of the jury, while they are still deliberating upon their verdict, as to how they stand numerically on the balloting.

Brasfield v. U. S., 272 U. S. 448, 71 L. Ed. 345;

Jordan v. U. S., 22 Fed. (2d) 966 (C. C. A. 9);

Stewart v. U. S., 300 Fed. 769 (C. C. A. 8);

Nigro v. U. S., 4 Fed. (2d) 781 (C. C. A. 8);

Wiederman v. U. S., 10 Fed. (2d) 745 (C. C. A. 8);

Berger v. U. S., 62 Fed. (2d) 438 (C. C. A. 10);

Burton v. U. S., 196 U. S. 283, 49 L. Ed. 482.

We will first cite portions of the record to show what action was taken by the trial court herein and then refer more specifically to the authorities above quoted.

The court on its own motion recalled the jury on Monday, January 29, 1934, shortly after 12 o'clock noon, after they had been deliberating approximately forty-six hours [Tr. p. 113], and inquired as to whether the jury had finished balloting in the conspiracy case No. 11752-H, in which appellant was named as a defendant as well as the appellant Harry M. Curry and others. The jury replied

that balloting had not been completed in that case [Tr. p. 115]. The court also inquired as to whether balloting had been finished on the other indictments, including case No. 11757-H, in which appellant Harry M. Curry was also on trial. The foreman replied that balloting had not been finished on case No. 11757-H [Tr. p. 115]. The court was further informed by the jury that balloting had been completed in case No. 11668-H, in which Clough was the only defendant on trial; also in case No. 11751-H, in which the only defendants on trial were Clough and Malowitz; also in case No. 11756-H, in which the only defendant on trial was Roscoe Clough [Tr. pp. 114, 115]. In other words, the jury had finished balloting on said three last-mentioned cases, in which Clough and Malowitz were defendants, and had, therefore, reached a verdict in said three cases as to the defendants Clough and Malowitz. We refer to this fact at this time for the purpose of showing that the error, if any, of the court in inquiring as to the numerical division of the jury could have no effect upon any verdict reached prior to the inquiry in the cases where Clough and Malowitz were defendants. The verdicts as returned by the jury were all dated. The record shows that the verdict of guilty in the conspiracy case as to the defendant Clough and the defendant Malowitz was dated (Saturday), January 27th, two days prior to the inquiry by the court [Tr. p. 126]. The verdict of guilty as against the defendant Clough in case No. 11757-H was also dated (Saturday), January 27, 1934, two days prior to said inquiry.

The record then discloses the following [Tr. p. 120]:

> "The court then made further inquiry of the jury as follows [Rep. Tr. p. 1721, line 10]:

" 'The Court: Now, turning to case No. 11752, may we inquire as to any balloting that still remains to be done, without indicating as to which defendant, but as to any balloting that still remains to be done —the numerical division with respect to such ballot.' [Rep. Tr. p. 1721, lines 10-14.]

"The defendants J. V. Spaugh and Harry M. Curry thereupon objected to the said inquiry of the court, in which the court asked the jury to indicate the numerical division of the jury and how the jury was divided on the balloting. Said objection was overruled and defendants J. V. Spaugh and Harry M. Curry thereupon duly excepted to said ruling.

" 'Foreman Person: In the case of one defendant, the ballot is ten to two; in the case of another defendant it is eleven to one.

" 'The Court: Turning now to case No. 11755, we understand balloting is still in progress there. Will you tell us what the numerical division is?

" 'Mr. Peterson: May the same objection be noted there, the same ruling and an exception, and also with reference to the third case which I assume Your Honor will inquire about.

" 'The Court: Yes. . . .' " [Tr. p. 120.]

The court then inquired as to the numerical division in another indictment and then the following proceedings occurred [Tr. p. 121]:

" 'The Court: Coming now to case No. 11757 [in which Appellant Curry was on trial], will you tell us the numerical division as to count 1?

Foreman Person: Eleven to one.

The Court: Count 2?

Foreman Person: Eleven to one.

The Court: Count 3?

Foreman Person: Eleven to one.

The Court: Count 4?

Foreman Person: Eleven to one.

The Court: Count 5?

Foreman Person: Eleven to one.

The Court: That is all to which balloting is still in progress.' [Rep. Tr. p. 1722, lines 1-25.]

"The defendants J. V. Spaugh and Harry M. Curry then and there objected to each and every inquiry made by the court as to how the jury were divided, which said objection was overruled and to which ruling the defendants J. V. Spaugh and Harry M. Curry then and there duly excepted." [Tr. p. 121.]

It is clear that at the time the said inquiries were made the jury was standing ten to two as to appellant J. V. Spaugh and eleven to one as to appellant Harry M. Curry, it being reasonable to infer, as appellant Harry M. Curry was a defendant in both the conspiracy case and case No. 11751-H, that the jury was standing eleven to one as to him in both cases. This conclusion is strengthened by the fact that the jury was also divided eleven to one in case No. 11755-H, in which appellant Harry M. Curry was also a defendant and was later acquitted [Tr. p. 121].

The portions of the record above quoted disclose that seasonable and timely objections and exceptions to the several inquiries by the court were taken, noted and saved by both appellant J. V. Spaugh and appellant Harry M. Curry [Tr. pp. 120, 121]. After considerable discussion

between the court, counsel and foreman of the jury and the rereading of certain instructions [Tr. pp. 122-126], the jury retired for further deliberation.

On Tuesday, January 30, 1934, at about the hour of 11:55 a. m., the jury returned a verdict in the conspiracy case, No. 11752-H, finding the defendants Clough, Malowitz, appellant J. V. Spaugh and appellant Harry M. Curry guilty. The verdict in the conspiracy case was dated Saturday, January 27, 1934, as to the defendants Clough and Malowitz, and was dated Monday, January 29, 1934, as to appellant Harry M. Curry, and was dated Tuesday, January 30, 1934, as to appellant J. V. Spaugh. The verdict in the conspirary case (11752-H) was in the following form [Tr. p. 126]:

> "We the jury in the above-entitled case impaneled and sworn, find the defendant Roscoe Clough is guilty.
>
> Dated Jan. 27, 1934.
>
> RAY K. PERSON, Foreman.
>
> We, the jury in the above-entitled case impaneled and sworn, find the defendant Jack Malowitz is guilty.
>
> Dated Jan. 27, 1934.
>
> RAY K. PERSON, Foreman.
>
> We, the jury in the above-entitled case impaneled and sworn, find the defendant Harry M. Curry is guilty.
>
> Dated January 29, 1934.
>
> RAY K. PERSON, Foreman.

We, the jury in the above-entitled case impaneled and sworn, find the defendant J. V. Spaugh is guilty.
Dated January 30, 1934.

RAY K. PERSON, Foreman.

Filed Jan. 30, 1934. R. S. Zimmerman, Clerk, by M. R. Winchell, Deputy Clerk." [Tr. pp. 126, 127.]

In case No. 11757-H the jury at the same time returned a verdict of guilty as to the defendant Clough, same being dated January 27, 1934, and a verdict of guilty as to defendant Malowitz, same being dated January 2, 1934, and a verdict of guilty as to defendant Harry M. Curry, which was dated January 29, 1934, said verdict being in the following form [Tr. p. 127]:

"We, the jury in the above-entitled case, impaneled and sworn, find the defendant

Roscoe Clough is guilty of Count One;
" " " Count Two;
" " " Count Three;
" " " Count Four;
" " " Count Five.

Dated Jan. 27, 1934.

RAY K. PERSON, Foreman.

We, the jury in the above-entitled case, impaneled and sworn, find the defendant

Jack Malowitz is not guilty of Count One;
" " " " Count Two;
" " " " Count Three;
" " " " Count Four;
" " " " Count Five.

Dated Jan. 28, 1934.

RAY K. PERSON, Foreman.

We, the jury in the above-entitled case, impaneled and sworn, find the defendant

Harry M. Curry is guilty of Count One;
" " " Count Two;
" " " Count Three;
" " " Count Four;
" " " Count Five.

Dated Jan. 29, 1934.

RAY K. PERSON, Foreman.

Filed Jan. 30, 1934. R. S. Zimmerman, Clerk, by M. R. Winchell, Deputy Clerk." [Tr. pp. 127, 128.]

It is apparent from the foregoing that the verdict of guilty as to appellant J. V. Spaugh was arrived at on Tuesday, January 30, 1934, twenty-four hours after the court had inquired as to the numerical division of the jury the day previous, Monday, January 29th. The same may also be said of the verdict as to appellant Harry M. Curry. Although this verdict is dated January 29, 1934, the foregoing proceedings clearly disclose that the jury had not completed balloting on his case at the time the court made the inquiry of the jury. That this inquiry constituted reversible error as to appellant J. V. Spaugh as well as appellant Harry M. Curry, under the rule announced in the authorities hereinbefore cited, cannot be doubted.

In *Brasfield v. United States, supra,* the judgment was reversed solely upon the grounds that the court erred in inquiring of the jury after it had failed to agree, after some hours of deliberation, as to how it was divided numerically. In that case the court was informed by the foreman that the jury stood nine to three without indi-

cating which number favored a conviction. The Supreme Court ordered a reversal, notwithstanding the fact that defendant's counsel failed to note an exception to the court's inquiry. The court states the rule as follows at page 346 of 71 L. Ed.:

> "The only errors assigned which are pressed upon us concern proceedings had upon the recall of the jury after its retirement. The jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three without indicating which number favored a conviction.
>
> "In Burton v. United States, 196 U. S. 283, 307, 49 L. Ed. 482, 490, 25 Sup. Ct. Rep. 243, where a conviction was reversed on other grounds, this court condemned the practice of inquiring of a jury unable to agree the extent of its numerical division, although a response indicating the vote in favor of or against conviction was neither sought nor obtained. This court then said (p. 308): 'We do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge.' . . .
>
> "We deem it essential to the fair and impartial conduct of the trial, *that the inquiry itself should be regarded as ground for reversal.* Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, *but in general its tendency is coercive.* It can rarely

be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

"The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. *Cf.* Wiborg v. United States, 163 U. S. 632, 658, *et seq.,* 41 L. Ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 220, *et seq.,* 49 L. Ed. 726, 731, 25 Sup. Ct. Rep. 429; Crawford v. United States, 212 U. S. 183, 194, 53 L. Ed. 465, 470, 29 Sup. Ct. Rep. 260; Weems v. United States, 217 U. S. 349, 362, 54 L. Ed. 793, 796, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705. *This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done."* (Italics ours.)

The same rule obtains in this Circuit, and was followed by this Honorable Court in *Jordan v. United States,* 22 Fed. (2d) 966, November 28, 1927. In that case about twenty-four hours after the jury retired to consider their verdict, the court recalled them of its own motion and, among other questions, asked the jury if it was about evenly divided. The foreman answered "Yes, sir." For this error the judgment was reversed. The court cites

and quotes with approval from *Burton v. United States,* 196 U. S. 283, and the *Brasfield* case, stating as follows, at page 966:

> "In Burton v. United States, 196 U. S. 283-305, 25 S. Ct. 243, 49 L. Ed. 482, the presiding judge asked the foreman how the jury was divided, stating that he did not desire to know how many stood for conviction, or how many stood for acquittal, but only how many stood one way, and how many stood the other way, and the foreman replied: 'Eleven to one.' In condemning the practice, the Supreme Court said:
>
> " 'We must say, in addition, that a practice ought not to grow up of inquiring of a jury, when brought into court because unable to agree, how the jury is divided; not meaning by such question, how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be. Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury. All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said, without asking for the fact as to the proportion of their division; and we do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge. Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain.'

"This language is perfectly plain, but trial judges continued to make the inquiry and, in view of the fact that the judgment in the Burton case was reversed on other grounds, there was a diversity of opinion in the different circuits as to the effect of the ruling. Some courts held that the inquiry itself was ground for reversal, while others condemned the practice, but held that the error was not prejudicial in the particular cases under review. The latter view was taken by this court."

Speaking of the holding in the *Brasfield* case, the court states, at page 967:

"This language is too plain to admit of further controversy. The court condemned both the form of the inquiry and the inquiry itself, and declared that in all future cases any such inquiry should be regarded as ground for reversal. It is idle to say that to ask a jury 'If it is about evenly divided' does not require it to disclose 'the proportion of division of opinion among the jury,' or 'to reveal the nature or extent of its division.'

"For this error, the judgment is reversed, and the cause is remanded for a new trial."

In *Stewart v. United States*, 300 Fed. 769, C. C. A. 8th Circuit, June 12, 1924, the defendant was convicted of using the mails to defraud. After the jury had been deliberating approximately one day they were recalled by

the court and asked whether they were evenly divided or whether there was a larger preponderance one way or the other. The foreman answered that there seemed to be a large preponderance one way. Thereupon the court gave them a supplemental instruction, said instruction being similar to that approved in *Allen v. United States,* 164 U. S. at page 501, 41 L. Ed. 528. A like supplemental instruction was also given by the trial court in the instant case. Under Point III of this brief appellant will discuss the question of error in the giving of this supplemental charge. The judgment in the *Stewart* case was reversed because of the inquiry made of the jury and the giving of said supplemental charge, following the rule in the *Burton* case, *supra.* The court states, at page 784:

> "In view of the express and clear declaration of the Supreme Court in its opinion in the Burton case that the proper administration of the law does not permit an inquiry of the jury by the presiding judge how it is divided, 'not meaning by such question how many stand for conviction or how many stand for acquittal, but meaning the proportion of the division, not which way the division may be' (196 U. S. 307, 308, 25 Sup. Ct. 250), and of the fact that the inquiry made of the foreman of the jury by the court below clearly asked such a question, there is to our minds no rational or logical way of escape from the conclusion that there was error in asking any question of the jury or of its foreman as to the standing of the jury or the proportion of their

division upon any issue, after that issue is submitted to them for decision, until after their verdict has been rendered or they have been discharged."

The same rule is announced in the *Nigro, Weiderman* and *Burton* cases, hereinbefore cited, and no useful purpose will be served by further quotations as to the law on this question. Additional authorities to the same effect are:

St. Louis v. Bishard, 147 Fed. 496;

McCoy v. United States, 98 S. W. 144;

Ball v. State, 70 S. E. 888;

Peterson v. United States, 213 Fed. 920.

The evidence presented by the Government in support of the charge against appellant Spaugh was in conflict with and contradicted by evidence presented in his behalf. [Tr. p. 131; Tr. pp. 62, 63.] The jury had considerable difficulty in reaching an agreement, as is evidenced by the length of time consumed in their deliberations, the questions asked by the jury when they were recalled [Tr. pp. 117, 102], and the further questions asked by the jury after the first question was answered by the court [Tr. pp. 124, 125]; also by the further fact that the trial court deemed it necessary to give the jury a supplemental charge [Tr. pp. 115, 117, 122, 123, 124, 125]. Under such circumstances the inquiry as to the numerical division was highly prejudicial to appellant and the trial court's error in this respect requires a reversal of the judgment.

III.

The Supplemental Charge Given by the Court Coerced the Jury in Arriving at Their Verdict as to Appellant and Constituted Reversible Error. (Specification of Error No. IV.) (Specification of Error No. V.)

The jury retired to consider of their verdict on Saturday, the 27th day of January, 1934, at the hour of 1:43 p. m. [Tr. p. 113.] On Monday, January 29, 1934, at approximately 12:15, the court, on its own motion, recalled the jury and ascertained that as to some defendants the jury had reached an agreement and that as to other defendants the jury had not agreed [Tr. pp. 114, 115]. The court thereupon, on its own motion, read the jury a supplemental charge as follows [Tr. pp. 116, 117]:

> "The only mode, provided by our Constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet [Rep. Tr. p. 1716, lines 1-26] in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or

that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the United States to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left a reasonable doubt, the defendant is entitled to the benefit of such doubt. And, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by [Rep. Tr. p. 1717, lines 1-26] most of those with whom they are associated; and possibly distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should likewise consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath." [Tr. pp. 116, 117.]

Appellant J. V. Spaugh and appellant Harry M. Curry duly excepted to that portion of the supplemental charge which, in effect, told the jury that the minority should yield their opinions to the majority [Tr. p. 118]. This supplemental charge is taken from *Allen v. United States,*

164 U. S. 492, 41 L. Ed. 528, and *Commonwealth v. Tuey,* 8 Cushing 1 (Mass.). While this instruction was approved in the *Allen* case under the circumstances there existing, the giving of this charge has been criticized in subsequent decisions and in some cases has been held to be reversible error. It should also be noted that the *Allen* case was then before the Supreme Court for the third time, two previous reversals having been ordered. (150 U. S. 551, 37 L. Ed. 1179; 157 U. S. 675, 39 L. Ed. 854.)

At the time this supplemental charge was given, the jury had been deliberating for nearly forty-eight hours and was standing ten to two as to appellant Spaugh and eleven to one as to appellant Harry M. Curry [Tr. pp. 120, 121]. After receiving this charge the jury retired and voted guilty as to defendant Curry, and approximately twenty-four hours later, on Tuesday, January 30, 1934, returned a verdict of guilty as to appellant Spaugh [Tr. pp. 126, 127]. By this instruction the jury were told that the case must at some time be decided and that there was no reason to suppose that the case would ever be submitted to twelve more intelligent men or that clearer evidence would ever be produced by either side and that it was the duty of the jurors to decide the case if they could conscientiously do so. The jury were further told that the minority ought to distrust the weight or sufficiency of evidence which failed to carry a conviction to the minds of the majority, and that a dissenting juror should consider whether the doubt in his own mind is a reasonable one which makes no impression upon the minds of the majority. In addition to giving this supplemental charge, the court, as heretofore pointed out, inquired as to the numerical division of the jury [Tr. pp. 120, 121].

This brings the facts in the instant case directly within the state of facts existing in *Stewart v. United States,* 300 Fed. 769, C. C. A. 8th Circuit, June 12, 1924, and renders the ruling there made applicable herein. In that case the court made inquiry as to how the jury was divided and also read them a supplemental charge similar to the one involved in this case. The court held that the excerpt from the opinion in the *Allen* case bore too hard upon the convictions of the minority and that the interests of justice would be promoted by the granting of a new trial. In this connection the court states at page 785:

> "The second question presented by the exceptions now under consideration here is: Was the supplemental charge and the reading of the excerpt from the opinion of the Supreme Court in Allen v. United States error? The excerpt from that opinion was not any part of the charge to the jury in that case, nor did the Supreme Court recommend that excerpt as a fit charge to the jury under such circumstances as existed in that case or in this. The supplemental charge to the jury under like circumstances in Allen's case was 'taken literally from a charge in a criminal case which was approved of by the Supreme Judicial Court of Massachusetts in Commonwealth v. Tuey, 8 Cush. 1, and by the Supreme Court of Connecticut in State v. Smith, 49 Connecticut, 376, 386.' 164 U. S. 501 (17 Sup. Ct. 157)."

And again at pp. 786 and 787:

> "This paragraph of the opinion in Allen's case, as we have said, was no part of the charge of the court in that case, but it was a part of the argument of the Supreme Court in support of the standard and ap-

proved charge in that case, and it was intended to show the absurdity of a stubborn refusal by a juror to listen to the arguments of his fellows, or to consider anything but the conclusion he had reached before the jury retired to deliberate. There was no evidence in this case that any juror had not listened with deference to the arguments of the majority, or that any juror went to the jury room with a blind determination that the verdict should represent his opinion of the case at the time he entered that room, or that any juror had closed his ears to the arguments of men who were equally honest and intelligent with himself. The legal presumption was and is that each juror had listened deferentially to and considered the arguments of those who differed with him, and thereafter had conscientiously formed and expressed his honest conviction and judgment upon the issues submitted to them, and, while the excerpt from the opinion in Allen's case was a proper and persuasive argument for the standard and approved charge under such circumstances, it so slightingly treated the positive duty of each juror to form and to make his verdict express his own honest conviction, based on the evidence in the case, and so forcibly urged deference to the views of the majority and unanimity, that *we are unable to resist the conviction that it tended too strongly toward coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority.* As was said by Judge Hook of the charge in St. Louis & S. F. R. Co. v. Bishard, 147 Fed. 502, 78 C. C. A. 62, the charge itself was not sufficiently guarded; its tendency was to bring the minority to an agreement with the others, even against the dictates of their own judgment.

"The jury in this case had deliberated many hours and had disagreed. There was at least one juror, perhaps more, that was convinced that the defendant was not guilty. The crucial questions in this case were questions of fact, that it was peculiarly the duty of the jury to consider and decide, among other things, the intention, the knowledge, the belief, the purpose, and good faith of the defendant Stewart. Much of the evidence on these questions was circumstantial: the testimony upon them was conflicting. The jury had disagreed. They received the supplemental charge from the court, retired, and in a short time returned with a verdict of guilty. As was said by the Supreme Court in Burton's case, 'A slight thing may have turned the balance against the accused under the circumstances shown by the record' (196 U. S. 307, 25 Sup. Ct. 250), the supplemental charge and especially the excerpt from the opinion in Allen's case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case." (Italics ours.)

In *Peterson v. United States,* 213 Fed. 920 (May 11, 1914), a similar situation was presented to this Honorable Court. It there appeared that after the jury had retired to deliberate upon their verdict, they were recalled and the trial court thereupon made inquiry as to how the jury were divided. After ascertaining the extent of the division, a supplemental charge was given, similar to that

referred to in the *Allen* case and given in the instant case. In condemning this practice the court states at page 924:

> "Considerable latitude is to be allowed the trial judge in impressing upon the jurors their duty at all times earnestly to endeavor, by a candid comparison of views and fair argument, to reach an agreement, and we are not disposed narrowly to limit this discretion. This we have recently decided in the case of Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391, also arising in the Montana district. But we are unable to give our sanction to the language here used; *it is plainly coercive in its general spirit and tendency*. We doubt whether it would be warranted even in the most extreme case, where the evidence is so overwhelming as to leave little, if any, room for doubt, and where plainly a disagreement would amount to a miscarriage of justice; but this is not such a case." (Italics ours.)

At the time this supplemental charge was given, the jury were in doubt as to the guilt or innocence of appellant Spaugh. The evidence as to his guilt was conflicting and contradictory. Under such circumstances a "slight thing" may have turned the balance against appellant in the minds of the jury. The giving of this supplemental charge was more than a slight thing and had the effect of compelling the two dissenting jurors to yield to the will of the majority.

Under similar circumstances the Supreme Court in *Burton v. United States,* 196 U. S. 283, 49 L. Ed. 482, said at pages 306 and 307:

> "Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more

than 36 hours and been unable to agree upon a verdict. . . . Balanced as the case was in the minds of some of the jurors, doubts existing as to defendant's guilt in the mind of at least one [here at least two], it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. . . . A slight thing may have turned the balance against the accused, under the circumstances shown by the record. . . ."

For other instances of reversible error in connection with the giving of a supplemental charge similar to that involved herein, see:

Nigro v. United States, 4 Fed. (2d) 781, 785, C. C. A. 8th Circuit, March 9, 1925;

Edwards v. United States, 7 Fed. (2d) 598, 602, C. C. A. 8th Circuit, July 28, 1925.

In the foregoing cases the error complained of was contained in a supplemental charge, but the rule is the same where the charge is given to the jury in the first instance before the commencement of their deliberations and before they had reached a point where they were unable to agree. This rule is found in *Gideon v. United States,* 52 Fed. (2d) 427, C. C. A. 8th Circuit, August, 1931. In that case the court gave a similar instruction to the jury as the one here involved and in effect told them

that the minority should view with distrust its own judgment, *"never surrendering an honest conviction."* In disapproving this language and ordering a reversal of the cause, the court states at page 431:

> "It is to be noted that this charge was given to the jury in the first instance; not after the jury had deliberated and had been unable to agree. *Even in the latter situation, this court has repeatedly disapproved charges to the jury which were couched in language not dissimilar to that used in the case at bar.*
>
> "In the case of Stewart v. United States, 300 F. 769, 785 (9th Circuit), this court, in an opinion written by Judge Walter H. Sanborn, carefully and exhaustively examined the subject of language proper to be used in charging a jury on the matter of agreement, and disapproved of the language used in the supplemental charge in that case, though it was no stronger than that used in the case at bar. Similar rulings have been made by this court in Nigro v. United States, 4 F. (2d) 781; Chicago & E. I. Ry. Co. v. Sellars, 5 F. (2d) 31; Edwards v. United States, 7 F. (2d) 598.
>
> "We think the charge above quoted given in the case at bar was not sufficiently guarded, and had a decided tendency toward coercion of a possible minority to an agreement, even against the dictates of their own judgment.
>
> "For the reasons above given, the judgment is set aside, and the cause remanded to the trial court, with instructions to grant a new trial." (Italics ours.)

Under the rule announced in the foregoing authorities the supplemental charge was clearly coercive and deprived appellant of a fair trial. At the time the charge was given there was no suggestion or intimation that the jurors had not examined the questions submitted to them with candor or with a proper regard and deference to the opinions of each other, and the statement that it was the duty of the jury to decide the case tended to bring pressure upon the dissenting jurors. The appellee will doubtless contend that this instruction has been approved in the *Allen* case, *supra*, but in that case the situation was quite different. In the present case the evidence was conflicting and contradictory and the jury must have been in grave doubt; otherwise it would not have required an additional twenty-four hours to reach a verdict. Under such circumstances the giving of this charge, having in mind the inquiry made by the court as to the division of the jury, is plainly coercive in its general spirit and tendency. The facts here involved are wholly dissimilar from those existing in the *Allen* case and the giving of the charge is not justified by that decision. This is the express holding of the *Stewart* and *Peterson* cases, *supra*. As was said in those cases, the instruction tended too strongly toward coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority, thereby depriving the defendant of a fair trial.

For the foregoing reasons the judgment should be reversed and a new trial ordered.

CONCLUSION.

By way of conclusion, appellant summarizes the several errors occurring at the trial, which deprived him of his substantial rights, as follows:

1. Error in the consolidation of the indictments.
2. Error in inquiring as to the division of the jury.
3. Coercion in the giving of the supplemental charge.

These errors were called to the attention of the trial court by way of a motion for a new trial, which was denied. The prejudicial effect of these errors has been amply demonstrated in the foregoing argument. Under the authorities hereinbefore cited, any one of these errors constitutes sufficient ground for a reversal of the judgment. Whether said errors are taken singly or collectively, the conclusion is irresistible that the interests of justice require that this cause be reversed and remanded for a new trial as to this appellant. As hereinbefore pointed out, a reversal of the judgment because of the inquiry of the court regarding the division of the jury will not affect the several judgments and sentences imposed on the non-appealing defendants, as the jury had already agreed on their verdict in those cases prior to the time the inquiry was made.

For the foregoing reasons the judgment should be reversed.

Respectfully submitted,

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
Attorneys for Appellant J. V. Spaugh.